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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

UNITED STATES OF AMERICA,) No. CR 11-0573 JSW
Plaintiff,)
v.)
PANGANG GROUP COMPANY, LTD.,) UNITED STATES' OPPOSITION TO
PANGANG GROUP STEEL) PANGANG GROUP DEFENDANTS'
VANADIUM & TITANIUM) MOTION TO QUASH SERVICE
COMPANY, LTD.,)
PANGANG GROUP TITANIUM)
INDUSTRY COMPANY, LTD., and)
PANGANG GROUP)
INTERNATIONAL ECONOMIC &)
TRADING COMPANY,)
Defendants.)
Date : June 7, 2012
Time: 2:00PM
Courtroom: Hon. Jeffrey S. White

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1 I. INTRODUCTION

2 Perhaps relying on Frank Robinson's nickname, "the Judge," defendants lead with his
 3 wisdom from the diamond rather than with authority from a court. Speaking to Time Magazine
 4 in 1973, the Reds and Orioles great said, "Close don't count in baseball. Close only counts in
 5 horseshoes and grenades." Time Magazine (July 31, 1973). Robinson's many accomplishments
 6 certainly made him an authority on baseball, but it is equally certain that he was not thinking
 7 about serving summonses on Chinese companies under Rule 4.

8 Baseball calls are, indeed, black and white – balls are balls, strikes are strikes, and you're
 9 either out or safe. But baseball's truths don't always carry into the courtroom.¹ Chief Justice
 10 Warren – an actual judge – explained that the Federal Rules "are not, and were not intended to
 11 be, a rigid code to have an inflexible meaning irrespective of the circumstances." *Fallen v.*
 12 *United States*, 378 U.S. 139, 142 (1964).² Unlike district court judges, baseball umpires do not
 13 analyze multi-factor tests, look for hallmarks to determine substance, or consider the exceptions
 14 that exist to general rules – all of which defendants (appropriately) invite and encourage this
 15 Court to do in deciding whether service of the summonses on Pan America, Inc. (PAI) was
 16 effective under Rule 4. *See* Def's Mem. at 5-10.

17 In the law, where the goal is justice rather than victory, circumstances matter. Here, the
 18 circumstances reveal three things: (1) the Pangang Group defendants received actual notice of
 19 the Superseding Indictment; (2) PAI is the general agent in the United States for the Pangang
 20 Group defendants; and (3) PAI is the alter ego of the Pangang Group defendants. For these
 21 reasons, defendants' motion to quash should be denied.

22
 23
 24 ¹ Hall of Fame baseball executive Bill Veeck contrasted the rigidity of baseball rules with
 25 the reality of the law: "Baseball is almost the only orderly thing in a very unorderly world. If you
 get three strikes, even the best lawyer in the world can't get you off."

26 ² Elevating substance over form is the guiding principle of the Federal Rules: "These
 27 rules are to be interpreted to provide for the just determination of every criminal proceeding, to
 28 secure simplicity in procedure and fairness in administration, and to eliminate unjustifiable
 expense and delay. Fed. R. Crim. P. 2. The Criminal Rules were designed to "eliminate
 technicalities" and "secure simplicity." *United States v. Debrow*, 346 U.S. 374, 376 (1953).

1 First, there is no denying that service on PAI resulted in actual notice. The four Chinese
 2 corporate defendants – all part of the Pangang Group of companies – received the summonses,
 3 hired attorneys, and appeared before the Court on the date designated by the summonses. The
 4 purposes of Rule 4 – to notify the defendants of the charges and bring them before the Court –
 5 have been accomplished. Perhaps as a result of this most obvious circumstance weighing so
 6 strongly against them, defendants contend that Rule 4 is both narrow and unyielding, and then
 7 argue that PAI resides outside the of realm of “alter ego” and “authorized agent for service of
 8 process” they declare to be the appropriate standard under the Rule.

9 The first flaw in defendants’ approach is that they propose that the Court start with an
 10 exception (alter ego) and work back at some point to the test actually prescribed by the Rule
 11 (agency). They compound this flaw by studiously ignoring the relevant provision of Rule 4
 12 (“general agent”) and invite the Court to instead chase a red herring (“agent authorized to receive
 13 service”).

14 The facts reveal, however, that PAI is the *general agent* for the Pangang Group defendants in
 15 the United States. *See* Fed. R. Crim. P. 4(c)(3)(C) (“A summons is served on an organization by
 16 delivering a copy to [a] . . . general agent”). PAI satisfies the Ninth Circuit’s test for general
 17 agency by performing activities that would be performed in its absence by other employees or
 18 agents of the Pangang Group defendants, and because defendants have the ability to control the
 19 business activities of PAI. As it is a general agent of defendants, service of the summonses on
 20 PAI was appropriate under Rule 4.

21 Finally, PAI is very much the alter ego of the Pangang Group defendants. Although this
 22 finding is not necessary given that PAI is a general agent under Rule 4, it is an easily sustainable
 23 alternative conclusion (and one the government requests that the Court reach). The facts to
 24 support this conclusion are set forth in detail below, but one of the more compelling comes in the
 25 form of a letter written to U.S. immigration authorities on behalf of the senior PAI employee,
 26 Qizhi Wang. The letter is written on the letterhead of PAI, complete with PAI’s address in New
 27 Jersey, its phone number, and website. *It is not, however, from PAI* -- it is signed by the
 28 Chairman of the Pangang Group itself, Fan Zhengwei, and concerns the importance of PAI to the

1 Pangang Group's business in the United States: "Our company transferred Mr. Wang to the
 2 United States as the General Manager of Pan America, Inc. to establish, manage and direct the
 3 operations of the company. In this position, he has been successful in developing *our* business
 4 relationships and opportunities." Declaration of Peter B. Axelrod, Ex. F at 1 (emphasis added).
 5 Chairman Fan is not an officer, director, or employee of PAI. Yet, in communicating with the
 6 United States Government on an important legal matter, his signature and position are placed on
 7 PAI letterhead -- as well as on the accompanying immigration forms as the representative of PAI,
 8 thus destroying any semblance of an argument that these companies maintain separate identities.
 9 *Id.* at 2-10.

10 Defendants cannot have it both ways and should be estopped from so arguing. They did not
 11 adhere to PAI's claimed separate existence when they had Chairman Fan sign legal documents
 12 sent to the U.S. government on PAI's behalf; they cannot now contend that PAI and Pangang
 13 Group are separate entities when trying to avoid being held to have received documents *from* the
 14 U.S. government.

15 The United States seeks a trial on the merits of the claims against the Pangang Group
 16 defendants named in the Superseding Indictment. Defendants' pusillanimous effort to hide
 17 behind their three-person New Jersey outpost in an attempt to avoid a trial is factually
 18 unsupportable, legally unjustifiable, and equitably barren. Their motion should be denied.

19 II. FACTS

20 A. The Pangang Group Defendants

21 The four Chinese corporate defendants in this case are part of a group of companies that are
 22 controlled by the government of the People's Republic of China (PRC). The Pangang Group
 23 Company, Ltd., which also is known as the Panzhihua Iron and Steel (Group) Company (the
 24 name was changed from the latter to the former in 2008), is the umbrella entity and the entity that
 25 is controlled directly by the State Asset Supervision and Administration Commission (SASAC)
 26 of the State Council. Declaration of Andrew Z. Szamosszegi, ¶¶ 13, 16 & 21-22. As explained
 27 by Qizhi Wang of PAI in a January 2011 letter to Ecuador's state oil company, EP Petroecuador:
 28 "Pangang Group Company Ltd. (<http://www.pzhsteel.com.cn>), . . . is one of the biggest iron and

1 steel integrated companies in China, a state-owned company, directly under the central
 2 government, the State-owned Assets Supervision and Administration Commission of the State
 3 Council (<http://www.sasac.gov.cn>) of the People's Republic of China.”³ Declaration of FBI
 4 Special Agent Katherine Pattillo, Ex. F.

5 Pangang Group owns and controls a subsidiary listed on the Shenzhen Stock Exchange,
 6 defendant Pangang Group Steel Vanadium and Titanium Company, Ltd. (PGSVTC).
 7 Szamosszegi Decl., ¶ 15. It is common for PRC state-owned enterprises to create stock-
 8 exchange-listed subsidiaries, over which they maintain “operational control.” *Id.*, ¶ 4. This is
 9 the case with the Pangang Group and PGSVTC, in that officials of Pangang Group subsidiaries
 10 that are technically owned by PGSVTC report to no one at PGSVTC and instead report directly
 11 to officials of the state-owned parent, Pangang Group. Pattillo Decl., ¶ 13 (employees of
 12 PGSVTC-owned companies reported directly to Pangang Group superiors, including Chen Yong,
 13 a Pangang Group official).

14 The two defendant organizations that are owned by PGSVTC but report up to Pangang Group
 15 are Pangang Group Titanium Industry Company, Ltd. (Pangang Titanium), and Pangang Group
 16 International Economic and Trading Company, Ltd. (PIETC). Defendant Pangang Titanium was
 17 established by Pangang Group in 2007 and is formally owned by PGSVTC. Pangang Titanium
 18 employees report directly to Chen Yong of Pangang Group. Pattillo Decl., ¶ 13. Defendant
 19 PIETC is the Pangang Group’s international trading company and is owned by Pangang Group,
 20 along with a separate Pangang Group subsidiary Panzhihua Iron and Steel Co., Ltd. (PISCO).

21 Management of the various parents and subsidiaries is shared and officers, directors, and
 22 employees are shuffled routinely from company to company. “[S]haring of management
 23 personnel is typical of the relationship between SOEs and their subsidiaries and a means by
 24 which the [Chinese Communist] Party and SASAC control the SOEs and subdivisions.”

25

26 ³ Li Rongrong, the Director of SASAC and Secretary of the CPC Central Committee,
 27 describes Pangang Group as “the biggest three-line enterprise for the comprehensive utilization
 28 of [China’s] resources of vanadium and titanium in the defense, military, and industrial packaged
 services.” *See* Pattillo Decl., Ex. S at 3.

1 Szamosszegi Decl., ¶ 22.

2 In 2010, Pangang Group merged with Anshan Steel (Angang Group). The merger was
 3 completed by year end and all of the merged company's assets are now owned by the Anshan
 4 Iron and Steel Group Corporation, which is 100% owned by the central SASAC. Szamosszegi
 5 Decl, ¶ 20; *see also* Pattillo Decl., Ex. S.

6 B. Pan America, Inc.

7 1. Creation and Ownership

8 PAI was created in 2008 by the Pangang Group for the purpose of dealing "directly" with
 9 Pangang Group's U.S. customers and doing "after-sale work." Pattillo Decl., ¶ 8. Seventy-five
 10 percent of PAI stock is owned by Pangang Group and 25% is owned by PIETC. PAI was
 11 capitalized entirely by contributions from Pangang Group (\$1.5 million) and PIETC (\$500,000).
 12 Pattillo Decl., Ex. Q. When the company was formed, Pangang Group Chairman Fan Zhengwei
 13 promised that "the parent company will increase its investment to make Pan America Inc. play a
 14 more important role in the economic exchange between China and the United States." Axelrod
 15 Decl., Ex. D at 7.

16 PAI's original board of directors consisted of three individuals -- Qizhi Wang, one
 17 representative of PIETC (Zusheng Zhang, who has since been replaced by another PIETC
 18 official), and one representative of Pangang Group (Bin Xue). Pattillo Decl., ¶ 8. Since the
 19 retirement of the PIETC representative in 2011, the board has had only two members. *Id.* The
 20 board meets periodically in the Pangang Jinmao Mansion, Chengdu City, Sichuan Province,
 21 where Pangang Group's offices (and the auditors who review PAI's books) are located. *See*
 22 Pattillo Decl., Exs. P and T.

23 The company is organized as a corporation in New Jersey, but it is shown on PIETC's
 24 internal organization chart (provided to the United States in support of Wang's application for
 25 legal permanent residency) as a division of PIETC, along with PIETC's other international and
 26 domestic sales offices. Axelrod Decl., Ex. F at 11; *see also* Pattillo Decl., ¶ 7 & Ex. U.

27 PAI operates according to "Policies and Procedures" mandated by the "Head Office" in
 28 China. These policies and procedures, referred to as "the P&P," set strict limitations on the

1 discretion and authority of PAI's management. The P&P manual provides, among other things:

- 2 • "This P&P basically is in line with the Head Office's General Affairs P&P and followed
3 by some minor amendments in order to comply with the common practice of the local
business environment."
- 4 • "The P&P, and any subsequent modifications should become effective following
approval by Head Office of the Company."
- 5 • "For other procedures not mentioned in the P&P, the overseas units should follow the
6 policies and procedures of the Head Office."
- 7 • The P&P sets purchase and spending limitations, including a requirement that any
8 unforeseen purchase or purchases "which have value of US\$20,000 and above, an official
memorandum should be forwarded to Head Office/Parent Company for approval by the
appropriate authority."
- 9 • Computer purchases and equipment leases must be in accordance with Head Office policy
10 and procedure and leases must be approved by the Head Office.
- 11 • PAI officials may not spend more than \$6,000 without Head Office approval, must seek
12 permission to spend for unbudgeted operational expenses, have no authority to make
unbudgeted capital expenditures or charitable donations, and cannot spend over \$300 for
entertainment without approval.

13 Pattillo Decl., Ex. D. The P&P contains numerous additional limitations on the authority of PAI
14 management to operate without Head Office approval. These limitations are effectively policed
15 by the Head Office, who sends auditors from China to PAI to review the U.S. office's books. *See*
16 Pattillo Decl., ¶ 12 & Ex. T.

17 The "Head Office" is Pangang Group Company, Ltd., and PAI acts as its representative in the
18 Americas, as was explained by Mr. Wang of PAI in his January 2011 letter to EP Petroecuador.
19 Pattillo Decl., Ex. F. He went on to explain that

20 Pan America, Inc., a U.S. company, registered in New Jersey of the United States, is a
21 subsidiary of Pangang Group Company Ltd., and represents Pangang Group Company
22 Ltd. in the whole America, including North America, South America and Central
America.

23 *Id.* Another version of the same letter, dated the following day and also signed by Mr. Wang, is
24 virtually identical, except that it more specifically describes PAI as the "marketing arm of the
25 Pangang Group Company Ltd." which it "represents" in the Americas. Pattillo Decl., Ex. G.

26 2. PAI's Employees Entered the United States as Intra-Company Transfers.

27 At the time the summonses were served, PAI had three employees: two Chinese nationals
28 and one local hire. The two Chinese nationals, Qizhi Wang and Chun Zhang are long-time

1 Pangang Group employees, both having worked for Pangang Group companies since finishing
 2 their educations. Axelrod Decl., Ex. D at 10-12 and Ex. E at 14-15, 23.

3 Both Wang and Zhang were admitted to the United States carrying “P” passports issued by
 4 the PRC government. Declaration of Mark McGovern, ¶ 3. “P” passports are “public affairs”
 5 passports issued by the PRC Ministry of Foreign Affairs of the PRC government. *Id.*, ¶ 4. They
 6 are issued to lower-level government employees and employees of state-owned companies for
 7 the purpose of travel related to company and/or government business. *Id.*

8 When they entered the United States for the purpose of forming and staffing PAI, both Wang
 9 and Zhang entered the country on L1-A visas issued to them by the U.S. Government. Axelrod
 10 Decl., Exs. D & E. L1-A visas are issued for the limited purpose of “intra-company transfers” of
 11 employees. The applicable regulations allow for such transfers where a U.S. subsidiary is
 12 controlled by a foreign parent and the foreign parent wishes to temporarily transfer staff to the
 13 United States to work at the subsidiary. Declaration of Aaron York, ¶¶ 4-5, 7, 9.

14 When Chun Zhang, one of PAI’s two management employees, applied for visas through the
 15 consulate in Chengdu in 2008 and 2010, the Pangang Group certified to the consulate that Zhang,
 16 who they described as an employee of PIETC, would lead a “delegation” of Pangang Group
 17 company employees for approximately two years. The certifications stated that “[a]ll of the
 18 expenses including health & medical insurance, accommodation and international airfare, etc.
 19 that may occur in the trip will be paid by Panzhihua Iron and Steel (Group) Company.” Axelrod
 20 Decl., Ex. E at 13.

21 A letter submitted to the U.S. Citizenship & Immigration Service (USCIS) in support of
 22 Wang’s 2009 L-1A “intra-company transfer” visa applications describes PAI as a subsidiary of
 23 Panzhihua Iron and Steel (Group) Company (PISCO)⁴ and as jointly owned by PISCO and
 24 PIETC, and states that PAI is “an agency” for their “trade business.” Axelrod Decl., Ex. D at 5.
 25 An attachment to the letter entitled “Business Summary and projection” also describes PAI as an
 26

27 _____
 28 ⁴ PISCO, Panzhihua, and Pangang Group are used interchangeably. For a detailed
 discussion of the complicated and evolving ownership structure of the monolithic Pangang
 Group, see the Declaration of Andrew Szamosszegi.

1 “agency for trade business, inviting bids or bidding for overseas contract work etc.” Axelrod
 2 Decl., Ex. D at 9.

3 The L1-A letter on behalf of Wang was signed by Fan Zhengwei, the Chairman of the
 4 Pangang Group. Axelrod Decl., Ex. D at 8. This letter was written on PISCO letterhead (in
 5 Chinese characters). The letter from Chairman Fan demonstrates that it was Pangang Group’s
 6 decision to transfer Wang and Zhang to the United States and is replete with references to how
 7 PAI and Wang are important to the *parent company’s business* in North America:

- 8 • “*We* wish to continue to employ Mr. Wang at *our* Northern Hemisphere head office in
 Englewood Cliffs, New Jersey in the position of General Manager of *our* U.S. office, Pan
 9 America, Inc. (PAI).”
- 10 • “Mr. Wang was employed with PISCO . . . as the General Manager of the Huanan Sales
 Company until his transfer to the U.S., *PISCO* *wishes* to continue to employ Mr. Wang in
 11 the same position”
- 12 • “*Our* corporate goal is to establish a comprehensive marketing system and development
 of business relationships with the United States and other companies”
- 13 • “*PISCO* transferred Mr. Wang to the United States”
- 14 • “*We* *wish* to continue to employ Mr. Wang . . . he has been instrumental in developing
 15 *our* business”

16 Axelrod Declaration, Ex. D at 5-7 (emphasis added).

17 Zhang continues to reside in the United States and work at PAI on a temporary intra-company
 18 L1-A visa. In 2010, however, PAI filed a formal petition with USCIS to adjust Wang’s status to
 19 that of lawful permanent resident. The first letter authored in support of the petition and dated
 20 March 2010 was nearly identical to the earlier letters submitted in support of Wang’s L1-A visa
 21 applications. PAI also submitted formal Notice of Entry of Appearance as Attorney or
 22 Accredited Representative in support of the petition, and a follow-up letter in July 2010 on PAI
 23 letterhead that is essentially a one-page summary of the much longer March letter. All of these
 24 documents, two of which are on PAI letterhead and one that represents PAI to be the authorized
 25 petitioner are signed, not by an employee, officer, or director of PAI, but by the *Chairman of the*
 26 *Pangang Group, Fan Zhengwei*. Axelrod Decl., Ex. F.

27 The March 2010 letter provides some further details regarding Wang’s job duties. One of his
 28 principle duties is to attend to the Pangang Group’s customers in the United States; another is to

1 “[e]stablish business operation procedures and interfaces with *corporate Headquarters* to ensure
 2 the communication and chain of operation is effective, efficient and in compliance with our
 3 parent company operations;” and another is to “[a]nalyze company financials and make
 4 recommendations to the Board of Directors *and superiors in China . . .*” *Id.* at 10 (emphasis
 5 added).

6 Corporate headquarters and the superiors in China manage PAI in one particularly critical and
 7 controlling respect: they set the salaries and other compensation of PAI’s two managers, Wang
 8 and Zhang. A memorandum obtained from PAI shows that Pangang Group, through PGSVTC,
 9 establishes salaries and incentive targets for employees of the company’s overseas sales offices.
 10 Pattillo Decl., Ex. H. The memo is addressed to PIETC and concerns its foreign subsidiaries in
 11 Europe, Hong Kong, and the United States. The memorandum sets the compensation, including
 12 base salary and performance pay, for the General Manager (in PAI’s case, Wang) and other
 13 “internally dispatched staff.” For example, the base salary for the general manager “is set at
 14 ¥200,000 after tax according to the company’s location.” A compensation ceiling is also
 15 established. The compensation is set not in dollars, but in Chinese yuan. *Id.*

16 3. PAI is Pangang Group’s Representative in the United States.

17 The Pangang Group defendants established PAI for the purpose of interacting with Pangang
 18 Group’s customers in the United States. Axelrod Decl., Ex. F at 6-14; Pattillo Decl., Exs. B & C.
 19 According to those customers, PAI’s employees act as the U.S. domestic representatives of the
 20 Pangang Group defendants and handle many of the duties and responsibilities that were handled
 21 by Pangang Group employees prior to the creation of PAI. *See* Declarations of Laird Walker,
 22 Phil Poce, Spencer Brog, and Bradley Decker.

23 For example, World Metals, a California customer of Pangang Group, was instructed by PAI
 24 after its formation to direct any inquiries regarding Pangang Group business to PAI. A World
 25 Metals officer explains:

26 Pan America employees performed the same services in the United States for WMI that
 27 Pangang and PIETC employees had performed prior to the creation of Pan America.
 28 From the context of our relationship, I considered Pan America to be the United States
 arm of Pangang Group and was able to communicate with the Pangang Group through
 Pan America, as needed.

1 Walker Decl., ¶ 2.

2 Another California customer, Coutinho & Ferrostaal, purchases steel from the Pangang
3 Group defendants and has a similar relationship with PAI:

4 Based on my dealings with Pangang Group and past correspondence with Pan America,
5 as well as the manner in which Mr. Wang represented himself and Pan America, I believe
6 that the purpose of Pan America is to represent Pangang Group's interests in the United
7 States. Before I became aware of Pan America's existence, employees of Pangang Group
8 and PIETC provided the same services to Coutinho that Pan America employees began
9 performing after it was established.

10 Decker, Decl., ¶ 3.

11 A customer in Pittsburg, California, Viking Industrial, conducts all substantive discussions
12 and negotiations with Pangang Group employees in China. PAI provides what is essentially
13 back-office support for Pangang Group in its interactions with Viking in that, after substantive
14 deals are reached, PAI "assist[s] with the administrative functions of producing the final
15 contracts, handling letters of credit and inspecting defective material." Brog Decl., ¶ 3. As to
16 Viking, PAI performs services that Pangang Group employees used to perform before PAI was
17 formed. *Id.*

18 Qizhi Wang was Viking's contact at Pan America. It was our sense that when Viking
19 asked Wang questions regarding issues such as specifications, capacity, or mill
20 parameters, he (Wang) would have to check with Pangang employees in China in order to
21 answer. Based on my experience, all final decisions with regard to pricing and
22 availability were made in China. We considered the Pan America office in New Jersey as
23 an extension of Pangang in China.

24 *Id.*, ¶ 4.

25 A&K Railroad Materials has a similar relationship with defendants and PAI. All important
26 negotiations and discussions are conducted with Pangang Group, terms are reached, and then PAI
27 handles the necessary paperwork on behalf of Pangang Group. "Based on my experience, people
28 in China working on behalf of Pangang and PIETC make all of the decisions, and the Pan
America representatives serve as clerks to run certain documents through." Poce Decl., ¶ 3.

29 Of particular relevance to the issue before the Court now, PAI regularly acts as a conduit for
30 communications regarding legal matters. When claims arise regarding product defects, PAI
31 employees have inspected defective products, communicated with customers regarding
32 settlement payments by the Pangang Group, and facilitated the wiring of refund payments to

1 resolve claims for defective products flowing from China to customers in the United States. *See*
 2 Walker Decl., ¶ 4; Poce Decl., ¶ 5; Brog Decl., ¶ 4-5; Decker Decl., ¶ 4; *see also* Pattillo Decl., ¶
 3 6 & Exs. J - M. PAI has acted as an intermediary for cross-border communications regarding the
 4 legal claims. Pattillo Decl., Exs. A & I.

5 PAI's role as the U.S. support organization for the Pangang Group's overall operations is
 6 detailed in a memorandum authored by PIETC in which PAI's responsibilities are dictated by
 7 PIETC. Pattillo Decl., Ex. O. The purpose of the memorandum is to "maximize [the Pangang]
 8 (Group's) limited resources, optimize the company's overall structure, and minimize risk."
 9 According to the memorandum, PIETC is responsible for formulating the "overall trade
 10 strategy," "resources, price administration," "VIP client administration," and other production-
 11 side duties; PAI is responsible for serving the customers in the United States, focused on
 12 marketing and "after service on sales." *Id.* at 1. The memorandum makes clear that PIETC and
 13 Pangang Group are the decision-makers with regard to filling orders:

14 America Inc. will on a monthly basis collect orders from clients in the America region
 15 market and submit reporting of its resource plan to International Trade Company from
 16 which the International Trade Company will report to the (Group) company and New
 Steel and Vanadium Company, pending confirmation for balance of resources, at which
 time the America Inc. will be notified by the International Trade Company.

17 *Id.* at 3.

18 4. PAI Performs Work Only for Pangang Group.

19 In his declaration in support of defendants' motion, Mr. Wang contends that PAI is not
 20 limited to selling products of PIETC and is "actively engaged" in looking for other suppliers with
 21 whom to do business. Wang Decl., ¶ 6.

22 However, PAI is the Pangang Group's "U.S.A. Exclusive Sales Office." Pattillo Decl., Ex.
 23 E. Moreover, both Wang and Zhang admit that PAI has never worked with any company other
 24 than the Pangang Group companies. Pattillo Decl., ¶¶ 8 & 10. According to publicly available
 25 information regarding imports, PAI has been listed since 2009 as the U.S. consignee in ten
 26 import shipments to the United States -- nine from PIETC and one from a Pangang Group joint
 27 venture. Szamosszegi Decl., ¶ 24. In other words, all of PAI's business comes from the Pangang
 28 Group.

1 5. PAI's Office Merger Was Directed by Pangang Group.2 The level of control the Pangang Group exercises over PAI is exemplified by its direction to
3 PAI that it move office space in June 2011, following the merger between Pangang Group and
4 Angang Group.5 In May 2010, Pangang Group and Angang Group merged into a single company. Declaration
6 of Pasquale Garofalo, Ex. A; *see also* Pattillo Decl., Ex. R. As a result of the merger between the
7 parent companies, it was decided that their U.S. subsidiaries should merge as well. *Id.* In late-
8 June 2011, three employees of Pan America, Inc. moved into the Angang office space. *Id.*, ¶ 3.
9 The employees of the two merged U.S. subsidiaries work in a common space, and Angang pays
10 the rent. *Id.*, ¶¶ 4-5.11 The decision and direction regarding the office merger came from PIETC -- it was not a
12 decision of PAI or its board. A January 2011 "Notice" sent from PIETC to PAI stated:

13 Pan America, Inc.

14 According to the merger and reorganization plan between Ansteel and Pangang, it is
15 requested that your company implement the office merger with Ansteel America, Inc.
16 before March 30th, 2011. Please have your company submit specific suggestions and
existing issues regarding the office merger in writing to the International Trading
Company before January 31st, 2011.

17 Notice is hereby given.

18 Pangang Group International Economic & Trading Co., Ltd.

19 Pattillo Decl., Ex. R.

20 C. PAI Assisted Pangang Group in the Investigation that Resulted in This Prosecution.21 PAI acted as the Pangang Group defendants' agent in the United States when Pangang
22 Group employees traveling in the United States were ordered to remain here as material
23 witnesses for several months in 2011.24 In July 2011, the United States conducted a search of the hotel rooms in which a number of
25 Pangang Titanium and PIETC employees were staying in Alameda, California. In September
26 2011, the United States obtained material witness warrants for three of those employees, two
27 from Pangang Titanium and one from PIETC. The material witnesses retained counsel in the
28

1 United States, were required to attend court proceedings, and met with counsel for the
 2 government on several occasions.

3 Acting at the direction of Chairman Fan and the Pangang Group, PAI employees were
 4 dispatched to provide assistance to the employees of the Pangang Group during their required
 5 stay in the Northern District of California. Zhang flew to the Bay Area to provide the employees
 6 with financial support and stayed with them at their hotel in Alameda. Zhang also attended court
 7 proceedings with the Pangang Group employees and acted as a translator for their
 8 communications with their retained attorneys. Wang traveled to the Bay Area to meet with the
 9 Chinese employees and took them to dinner, spending \$1800 to entertain them. Pattillo Decl., ¶
 10 7 & 11.

11 In addition, PAI was asked by the Pangang Group defendants to advance the legal fees paid
 12 to counsel for the employees. PAI ultimately advanced at least \$600,000 to lawyers for the
 13 individual Chinese material witnesses on behalf of Pangang Titanium and PIETC that did not
 14 require the payment of interest on the advanced sums. Pattillo Decl., ¶¶ 7, 9-10 & Ex. W. The
 15 agreements require Pangang Titanium and PIETC to reimburse PAI, but they do not require the
 16 payment of interest on what is in substance a \$600,000 loan.

17 Finally, while Zhang was in California assisting the individual employees, he acted as a
 18 conduit for information between the employees and their Pangang Group company employers in
 19 the PRC. Zhang spoke to officials of both PIETC and Pangang Titanium regarding expenses
 20 incurred by the employees. Zhang also received and related to the employees instructions from
 21 the General Manager of Pangang Titanium regarding the computers that were seized when the
 22 FBI searched their motel rooms. According to Zhang, the General Manager asked him to advise
 23 the employees to take the position that the computers belonged to them and that their company
 24 was not responsible for the content of the information on the computers. Zhang relayed this
 25 information to the employees.⁵ Pattillo Decl., ¶ 10.

26
 27 ⁵ It is not the purpose of this brief to parse the meaning of this instruction, but suffice it to
 28 say that it appears that the material witnesses were being directed what to tell the FBI regarding
 the contents of their computers.

III. ARGUMENT

A. Rule 4

Federal Rule of Criminal Procedure 4(c)(3)(C) provides that service of a summons on an organizational defendant is effected as follows:

A summons is served on an organization by delivering a copy to an officer, to a managing or general agent, or to another agent appointed or legally authorized to receive service of process. A copy must also be mailed to the organization's last known address within the district or to its principal place of business elsewhere in the United States.

The purpose of Rule 4 is to “bring the defendant notice of the action so that it has a reasonable opportunity to appear and defend the suit.” *Heise v. Olympus Optical Co., Ltd.*, 111 F.R.D. 1, 6 (N.D. Ind. 1986). Contrary to defendants’ contention that Rule 4 should be applied rigidly, “Rule 4 is a flexible rule that should be liberally construed to uphold service so long as a party receives sufficient notice of the complaint.” *Chan v. Society Expeditions, Inc.*, 39 F.3d 1398, 1404 (9th Cir. 1994).⁶

B. The United States Served PAI, Pangang Group's General Agent, and Mailed the Summons to the Agent's Principal Place of Business in the United States.

After the Superseding Indictment was returned by the grand jury, the magistrate judge issued summonses for the four Pangang Group defendants. The magistrate judge ordered that the summonses be mailed by the clerk's office to PAI's address in New Jersey, which is the address set forth on the summonses. Although the Clerk's office apparently did not in fact mail the summonses to PAI, the U.S. Attorney's office did so by certified mail. Axelrod Decl., ¶ 5, Ex. B.

In addition, the summonses issued by the Court were delivered by an FBI agent to Brenda Kong, a PAI employee, at PAI's office in New Jersey. Counsel for PAI acknowledged receipt of the summonses by PAI and advised the United States that additional service on Mr. Wang was not necessary to effect service on PAI. Executed summonses have been filed with the Court.

⁶ The Federal Criminal Rules and the Federal Civil Rules contain virtually identical provisions for effecting service of summonses on organizational defendants. *Compare* Fed. R. Crim. P. 4(c)(3)(C) with Fed. R. Civ. P. 4(h)(1)(B). Not only is the language of the two provisions materially the same, the courts that have published rulings on service of corporate defendants in criminal cases have relied heavily on civil case law concerning service of summonses.

1 Axelrod Decl., ¶ 4, Ex. A.

2 Because PAI is a general agent of the Pangang Group defendants, personal service of the
 3 summonses on PAI followed by mailing the summonses to PAI's office in the United States
 4 satisfies Rule 4(c)(3)(C). *See United States v. Public Warehousing Co K.S.C.*, 2011 WL
 5 1126333, *5 (N.D. Ga. 2011) (holding that personal service and service by mail on corporate
 6 defendant's U.S. alter ego was sufficient); *United States v. Chitron Elec. Co., Inc.*, 668
 7 F.Supp.2d 298, 306 (D. Mass. 2009); *see also Heise*, 111 F.R.D. at 6 (the group president of the
 8 American subsidiary was "a person whose position is one of sufficient responsibility so that it is
 9 reasonable to assume that he would transmit notices to" the foreign parent, making it a the
 10 general agent under Rule 4).

11 C. The Pangang Group Defendants Received Notice of the Superseding Indictment and
Court Proceedings.

12 The Court should begin its analysis with the reality that defendants simply ignore. The
 13 Pangang Group defendants received notice of the Superseding Indictment, hired attorneys, and
 14 appeared in court in San Francisco on the date designated by the summonses. The purpose of
 15 Rule 4, therefore, has been accomplished.

16 While this is not the end of the analysis -- the requirements of Rule 4(c)(3)(C) must be met --
 17 "actual notice is a relevant consideration in determining that service on an agent in an otherwise
 18 proper manner was sufficient." *Wells Fargo & Co. v. Wells Fargo Express Co.*, 556 F.2d 406,
 19 424 n.20 (9th Cir. 1977). The fact that the Pangang Group defendants actually received notice as
 20 a result of service of the summons on PAI speaks directly to the sufficiency of the delivery
 21 method of the summonses. It is, as defendants point out, "fundamental" that defendants in
 22 litigation be "notified of the action, and brought under the court's authority, by formal process."
 23 *Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 350 (1999). There is no
 24 denying that after formal process was issued by this Court, the Pangang Group defendants were
 25 in fact notified and appeared before the Court through counsel. The fundamental tenet that
 26 notice be given has been met.

1 D. PAI Is the Pangang Group Defendants' General Agent in the United States.

2 In framing their motion, the Pangang Group defendants focus on whether PAI was their "alter
 3 ego." Def's Mem. at 1:12-14 & 9-10. Along the way, defendants throw out a straw horse
 4 observation that PAI was "not an authorized agent for service of process for any of the Pangang
 5 defendants." Def's Mem. at 4:8-9.

6 Defendants fail, however, to address the obviously relevant provision of Rule 4(c)(3)(C),
 7 which permits service of a summons on an organization by serving that organization's "general
 8 agent." PAI is the Pangang Group's general agent in the United States, and service was properly
 9 effected on the Pangang Group defendants by serving PAI.

10 Whether a subsidiary like PAI is a "general agent" is determined by applying a two-part test
 11 adopted by the Ninth Circuit in the context of personal jurisdiction cases, but also applicable to
 12 determining whether service of process was effective. *See Chan v. Society Expeditions, Inc.*, 39
 13 F.3d 1398, 1404-05 (9th Cir. 1994) (finding that service would be effective if general agency test
 14 for personal jurisdiction were satisfied); *see also Bauman v. DaimlerChrysler Corp.*, 644 F.3d
 15 909, 920-23 (9th Cir. 2011) (explaining two-pronged test for general agency). The test is:

16 (1) Does "the subsidiary function[] as the parent corporation's representative in that it
 17 performs services that are sufficiently important to the foreign corporation that if it did
 18 not have a representative to perform them, the corporation's own officials would
 19 undertake to perform substantially similar services"? *Bauman*, 644 F.3d at 920, quoting
 20 *Chan*, 39 F.3d at 1404-05.

21 (2) Does the parent have sufficient ability to control the activities of the subsidiary?
 22 *Bauman*, 644 F.3d at 920-21.

23 Determining whether a subsidiary is a general agent under this two-prong test is factually-
 24 intensive and must be decided on a case-by-case basis. *Bauman*, 644 F.3d at 920 n.12, *citing*
 25 *Wells Fargo*, 556 F.2d at 426.

26 Applying this test, the Court should conclude that the services provided by PAI are
 27 sufficiently important that, if it did not exist, the Pangang Group defendants would perform those
 28 services themselves, just as they did before PAI was created in 2008. The Court should further
 29 conclude that the Pangang Group defendants have the right to control PAI's business activities.

1 1. PAI Performs Services in the United States That Are Sufficiently Important That
 2 If it Did Not Perform Them, a Representative of Pangang Group Defendants
 3 Would Perform Them.

4 PAI performs as the Pangang Group defendants' agent in the United States by performing
 5 services that the Pangang Group defendants would be required to perform if PAI did not exist --
 6 and, indeed, did perform before PAI was created. “[A] subsidiary acts as an agent if the parent
 7 would undertake to perform the services itself *if it had no representative at all* to perform the
 8 services.” *Bauman*, 644 F.3d at 921, *citing Doe v. Unocal Corp.*, 248 F.3d 915, 928 (9th Cir.
 9 2001). Or, “[a]s the Second Circuit explained, a court ‘may assert jurisdiction over a foreign
 10 corporation’ when it affiliates itself with a local entity whose services ‘are sufficiently important
 11 to the foreign entity that the corporation itself would perform equivalent services *if no agent were*
 12 available.’” *Bauman*, 644 F.3d at 921-22, *quoting Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d
 13 88, 95 (2d Cir. 2000).

14 As described above, Pangang Group created PAI to represent its interests and expand its
 15 business in the United States. Pangang Group transferred two long-term Pangang Group
 16 company employees, Wang and Zhang, to PAI in an effort to expand and develop their business
 17 in the United States, a role the Chairman of Pangang Group described in 2010 as “key.” Axelrod
 18 Decl., Ex. F at 10. The letter written by Chairman Fan of Pangang Group in support of Wang’s
 19 application demonstrate that the very purpose of PAI was to support and contribute to the
 20 Pangang Group’s business. The evidence shows that PAI was not conceived or implemented as
 21 anything more than an organization that exists for the support and benefit of the Pangang Group
 22 companies.

23 PAI plays precisely this role, as it holds itself out to be the Pangang Group’s agent in the
 24 United States and the rest of the Americas. In submissions to USCIS in support of Wang’s and
 25 Zhang’s visa applications and status adjustments, PAI is described as an “agency” of the Pangang
 26 Group’s steel, vanadium, and titanium businesses. Axelrod Decl., Ex. D. PAI describes itself as
 27 the Pangang Group’s “representative” and “marketing arm” in the Americas. Pattillo Decl., Exs.
 28 F & G.

29 The declarations from the Pangang Group’s U.S. customers establishes that PAI’s role is to

1 act on the Pangang Group's behalf in the United States. The duties that PAI employees
 2 undertook to perform, after it was formed in 2008, are precisely the same duties that Pangang
 3 Group employees performed prior to the formation of PAI. Some of Pangang Group's customers
 4 were asked to direct communications to PAI in lieu of Pangang Group beginning in 2009. While
 5 customers generally negotiate important matters regarding contract terms with Pangang Group
 6 employees in China, routine, back-office tasks that once were performed by Pangang Group
 7 company employees, are now performed by PAI employees. A typical example of PAI's work is
 8 PAI employee Zhang's role as intermediary between a World Metal executive and Pangang Group
 9 officials in China regarding the itinerary for World Metal's visit to Pangang Group's
 10 offices in Chengdu. *See* Walker Decl., ¶ 3.

11 Particularly relevant to the issue before the Court, PAI performs responsibilities related to
 12 legal claims U.S. customers have against the Pangang Group defendants. When claims by
 13 customers arise related to defective products supplied by Pangang Group manufacturers in China,
 14 PAI employees have been dispatched to inspect the defective materials and participated in
 15 negotiations to resolve those claims. PAI has acted as a conduit for reimbursements to be paid by
 16 Pangang Group to customers claiming that purchased goods were defective. *See, e.g.*, Brog
 17 Decl., ¶ 6; Pattillo Decl., Exs. J-M. PAI has been an intermediary between U.S. customers and
 18 the Pangang Group in China regarding legal claims arising in the United States. Pattillo Decl.,
 19 Ex. A. This is *precisely* the role they play as recipient of service of legal process -- they are a
 20 regular and obviously reliable conduit for communication regarding legal matters in the United
 21 States.

22 PAI is, in fact, the Pangang Group's only agent in the United States -- or, as they put it, the
 23 Pangang Group's "U.S.A. Exclusive Sales Office." Pattillo Decl., Ex. E. Wang asserts in his
 24 declaration that PAI can seek to develop relationships with other Chinese suppliers. But that is
 25 not at all relevant to the question before the Court, which simply is whether PAI is the Pangang
 26 Group defendants' agent. Whether PAI may hypothetically someday be the agent for another
 27 company (it hasn't done so yet) is immaterial.

28 Finally, in connection with the investigation that led to the Superseding Indictment in this

1 case, PAI acted true to purpose -- it handled the affairs of Pangang Group in the United States.
 2 PAI's employees traveled to the Bay Area, stayed with the Pangang Group material witnesses,
 3 attended to their financial affairs, acted as translators, attended court proceedings, arranged for
 4 their legal fees to be paid, entertained them, and relayed communications to them from PIETC
 5 and Pangang Titanium officials in China.

6 PAI exists only to benefit the interests of the Pangang Group and is the exclusive
 7 representative of the Pangang Group in the United States. The legal question relevant to the
 8 determination of general agency is whether the services provided by PAI in the United States
 9 would be performed by Pangang Group if PAI did not exist. From the very nature of the duties
 10 performed by PAI and the circumstances surrounding its creation by Pangang Group, that is
 11 obviously so. The Court need not speculate because these very services were in fact performed
 12 by Pangang Group employees before PAI was created, as is documented in the declarations of
 13 Pangang Group's U.S. customers.

14 2. Pangang Group Has the Ability to Control the Activities of PAI.

15 Control, the Ninth Circuit holds, "is a traditional element of agency under common law
 16 principles" and must be established in order to find general agency. *Bauman*, 644 F.3d at 922.
 17 The question is whether the foreign defendant has the right or ability to control the significant
 18 business activities of its representative in the United States. *Id.* The question for agency is not,
 19 as defendants' wish to have it, whether the foreign defendant exercises actual control, because
 20 that "conflates the agency and alter ego tests." *Id.*

21 The test for an agency relationship does not require absolute control. "[A] person may be an
 22 agent although the principal lacks the right to control the full range of the agent's activities, how
 23 the agent uses time, or the agent's exercise of professional judgment." *Id.* at 923. Agents, the
 24 Ninth Circuit has explained, "may exercise a considerable amount of discretion in performing
 25 their functions." *Id.*

26 The Pangang Group certainly has the ability to control the conduct of PAI's business and the
 27 evidence demonstrates that they actually exercise control over the most important aspects of the
 28 business, including placement and compensation of key executives, office space, and

1 responsibilities for relationships with customers.

2 The evidence demonstrating Pangang Group's control over PAI is overwhelming and
3 includes:

- 4 • The authority and discretion of PAI employees is severely circumscribed by company
5 policy. Under the Policies and Procedures Manual, all significant expenditures must be
approved by the Head Office in China. Pattillo Decl., Ex. O.
- 6 • Salary and compensation is set by the Pangang Group, not by PAI's board or
management. *Id.*, Ex. H.
- 7 • The duties and responsibilities of PAI vis-a-vis U.S. customers are established by
8 Pangang Group -- not by PAI. This goes to the very heart of PAI's existence; it is, after
9 all, a sales office. The division of responsibilities between PAI and PIETC, moreover,
10 can be broken down into two categories: PIETC has the important responsibilities; PAI
has the clerical, the administrative, and the less important responsibilities. *Id.*, Ex. O &
Customer Declarations.
- 11 • Pangang Group Chairman Fan signs letters on PAI letterhead. In one of those letters, he
12 recites Mr. Wang's responsibilities, which includes making reports to Wang's "superiors"
in China. Axelrod Decl., Ex. F.
- 13 • When Pangang Group merged with another company, it "gave notice" to PAI that it
14 would be moving its office to merge with the new company's U.S. subsidiary. Pattillo
Decl., Ex. R.
- 15 • PAI's U.S. employees are in the United States on "P" passports, which are passports
16 issued to employees of Chinese state-owned companies. Pangang Group is a state-owned
company controlled by an agency of the central government. McGovern Decl., ¶¶ 3-4.
- 17 • PAI is shown as a division of PIETC on an organizational chart submitted to USCIS.
Axelrod Decl., Ex. F at 11.
- 18 • Auditors dispatched from Pangang Group's offices in China audit the books and records
19 of PAI. Pattillo Decl., Ex. T.
- 20 • Pangang Group controls PAI from the perspective of their customers, who explain that
21 Pangang Group is the decision-maker regarding material issues and PAI carries out
certain limited administrative responsibilities on behalf of Pangang Group. *See* Customer
Declarations.

22 Perhaps the most definitive evidence establishing control is the L1-A visas that have been
23 issued to PAI employees Wang and Zhang in order for them to enter the United States. An L1-A
24 visa is a temporary, *intra-company* transfer visa. In order to obtain an L1-A visa for an employee
25 of a foreign company to work for a subsidiary in the United States, the foreign company must
26 show that it owns and controls the U.S. subsidiary. "In the event the foreign company does not
27 own and control the qualifying organization, the law does not permit issuance of an L1-A visa
28

1 and any visa issued under such circumstances is subject to revocation.” Declaration of Aaron
 2 York, ¶ 9. Thus, in order to obtain L1-A visas for Wang and Zhang, Pangang Group was
 3 required -- and through their letters and submissions did -- establish that Pangang Group owned
 4 and controlled PAI.

5 This evidence of control far exceeds the required showing of an “ability to control” required
 6 under the test for general agency established by the Ninth Circuit.

7 E. PAI Is the Alter Ego of the Pangang Group.

8 The Pangang Group defendants focus their arguments on disproving a contention that PAI is
 9 their alter ego. The bar for finding alter ego is, of course, higher than it is for finding general
 10 agency, which explains defendants’ attempt to fix that as the hurdle the government must clear.
 11 As set forth above, the primary basis for finding that service on PAI was effective is that PAI is
 12 the Pangang Group defendants’ general agent in the United States. However, the record also
 13 supports a finding that PAI is in fact the Pangang Group defendants’ alter ego.

14 1. Defendants Should Be Estopped from Arguing That PAI Is Not Their Alter Ego.

15 Equity forbids the Pangang Group defendants from arguing that PAI is not their alter ego. In
 16 communicating directly with the United States government on immigration matters, the Pangang
 17 Group holds itself out to be a single entity, controlled by its state-owned parent. Since the
 18 formation of PAI in 2008, the Pangang Group has repeatedly taken the position with the U.S.
 19 immigration authorities that its PAI employees are temporary transfers from the foreign parent
 20 that exercises control over the subsidiary.

- 21 • The L1-A visas which Wang and Zhang were issued to enter the United States are “intra-
 22 company transfer” visas.
- 23 • In seeking visas from the U.S. consulate in Chengdu twice for Zhang, the Pangang Group
 24 defendants described him as “leading a delegation” of PIETC employees on a temporary
 assignment, during which all expenses would be paid by the Pangang Group. Axelrod
 Decl., Ex. E.
- 25 • When seeking to adjust Wang’s status to legal permanent resident of the United States,
 26 Pangang Group Chairman Fan authored letters to USCIS on PAI letterhead in which he
 27 explained the circumstances surrounding Mr. Wang’s assignment to PAI and outlined in
 28 detail its benefits to the Pangang Group. These letters not only disregard the distinction
 between Chairman Fan’s company -- Pangang Group -- and PAI, but they conclusively
 establish that PAI exists for the benefit and growth of the parent company. *See* Axelrod
 Decl., Ex. F.

1 • Perhaps most compelling, in the formal immigration application for Mr. Wang, Chairman
 2 Fan signs twice as the legal representative of PAI. As Chairman Fan is not an officer,
 3 director, or employee of PAI, the defendants simply ignored basic corporate formalities
 4 by having him sign as the representative of PAI. *Id.*

5 Defendants now make an argument that is flatly contrary to the positions they have taken in
 6 seeking entry for their employees into the United States. They should be estopped from making
 7 this argument before the Court. Equitable estoppel is a doctrine ““by which a person may be
 8 precluded by his act or conduct . . . from asserting a right which he otherwise would have had . . .
 9 .”” *Jablon v. United States*, 657 F.2d 1064, 1068 (9th Cir. 1981), quoting Black’s Law
 10 Dictionary (5th ed. 1980); accord *Int’l Paper Co. v. Schwabedissen Maschinen & Anlagen*
 11 GMBH, 206 F.3d 411, 417-18 (4th Cir. 2000) (“[e]quitable estoppel precludes a party from
 12 asserting rights he otherwise would have had against another when his own conduct renders
 13 assertion of those rights contrary to equity.”).

14 Having repeatedly taken the legal position with the U.S. government that the PAI’s
 15 employees are intra-company transfers acting on behalf of the Pangang Group’s interests and
 16 Chairman Fan having made direct representations to the government on behalf of PAI,
 17 defendants cannot now be heard to deny that PAI is defendants’ alter ego. To permit this
 18 argument would be manifestly unjust.

19 2. The Evidence Proves That PAI Is the Pangang Group’s Alter Ego.

20 The evidence to support that finding is largely duplicative of the evidence establishing agency
 21 -- particularly control -- set forth above. The question is, primarily, one of degree. Unlike
 22 control for agency purposes, which requires only a showing of ability, the question for alter ego
 23 purposes is whether the Pangang Group defendants’ actually control PAI and ignore the
 24 corporate formalities necessary to maintain PAI as a separate entity.

25 As defendants point out, only four district court judges have published opinions that address
 26 service on foreign organizational defendants through a domestic subsidiary under Criminal Rule
 27 4. Three of the cases address the government’s argument that the domestic subsidiary was the
 28

1 alter ego of the foreign parent defendant;⁷ the fourth case, with minimal analysis, simply holds
 2 that the government failed to serve an agent specifically authorized to receive service of process.⁸

3 The test for whether a domestic subsidiary is the alter ego of a foreign parent is not clearly
 4 articulated in any of the reported cases. In *Chitron*, the district court focused on whether “the
 5 relationship between the parent and the subsidiary is such that the subsidiary is a mere conduit
 6 for the activities of its parent” and whether the government was able to show a ““lack of
 7 corporate independence, fraudulent intent, and manifest injustice.”” 668 F. Supp. 2d at 305,
 8 quoting *United Elec. Radio & Mach. Workers of Am. v. 163 Pleasant St. Corp.*, 960 F.2d 1080,
 9 1093 (1st Cir. 1992). In *Public Warehousing*, the court applied a multi-factor test used by the
 10 Eleventh Circuit to determine whether a subsidiary is the alter ego of its parent. 2011 WL
 11 112633, at *5-6. And in *Alfred L. Wolff*, the district court focused primarily on the government’s
 12 argument that the domestic subsidiary was formed and used for the purpose of effecting a fraud,
 13 2011 WL 4471383, at *4-6, while mentioning in passing a number of factors that ““come into
 14 play when discussing whether separate legal entities should be regarded as alter egos.”” *Id.* at *6,
 15 quoting *Harper v. Delaware Valley Broadcasters, Inc.*, 743 F. Supp.1076, 1085 (D. Del. 1990).
 16 Importantly, all of the courts adhere to the principle that determining whether to disregard
 17 corporate form is a fact-specific exercise in equity that is not formulaic. “No single factor is
 18 determinant, and ‘[t]he legal test for determining when a corporate form should be ignored in
 19 equity cannot be reduced to a simple formula.”” *Id.*, quoting *NetJets Aviation, Inc. v. LHC
 20 Commincations, LLC*, 557 F.3d 168, 177 (2d Cir. 2008).

21 In the Ninth Circuit, the determination of alter ego “is predicated upon a showing of parental
 22 control over the subsidiary.” *Bauman*, 644 F.3d at 920. The two basic prongs of the alter ego
 23 analysis are:

24 (1) that there is such unity of interest and ownership that the separate personalities of the

26 ⁷ *United States v. Alfred L. Wolff GMBH*, 2011 WL 4471383 (N.D. Ill. 2011); *United
 27 States v. The Public Warehousing Co. K.S.C.*, 2011 WL 1126333 (N.D. Ga. 2011); *United States
 28 v. Chitron Elec. Co., Ltd.*, 668 F. Supp. 2d 298 (D. Mass. 2009).

⁸ *United States v. Johnson Matthey PLC*, 2007 WL 2254676 (D. Utah 2007).

1 two entities no longer exist and (2) that failure to disregard their separate identities would
 2 result in fraud or injustice. The first prong of this test has alternately been stated as
 3 requiring a showing that the parent controls the subsidiary to such a degree as to render
 4 the latter the mere instrumentality of the former.

5 *Doe v. Unocal Corp.*, 248 F.3d 915, 926 (9th Cir. 2001) (internal citations and quotation marks
 6 omitted). “Issues of alter ego do not lend themselves to strict rules and *prima facie* cases.
 7 Whether the corporate veil should be pierced depends on the innumerable individual equities of
 8 each case.” *United States v. Standard Beauty Supplies Stores, Inc.*, 561 F.2d 774, 777 (9th Cir.
 9 1977).

10 The evidence described above detailing the Pangang Group’s control over PAI’s activities
 11 applies with equal force in the alter ego analysis. The difference is that the question for control
 12 under the agency test is the *ability* to control, while the question when piercing the corporate veil
 13 is *actual* control, which requires a more exacting level of proof. *See Bauman*, 644 F.3d at 920.
 14 In this case there is little obvious distinction between the Pangang Group’s ability to control PAI
 15 and its actual control of PAI. The most obvious manifestation of this is Chairman Fan’s
 16 signature on PAI documents, but the remaining evidence is legion -- Pangang Group controlled
 17 PAI’s salaries and compensation, its relationships with customers, its executives’ spending
 18 authority, and myriad other significant facets of PAI’s business activities. PAI’s employees were
 19 dispatched to the United States as intra-company transfers and carry passports that are issued by
 20 the PRC Ministry of Foreign Affairs to employees of Chinese state-owned enterprises. The
 21 company’s customers in the United States regard PAI simply as Pangang Group’s U.S.
 22 manifestation -- a “conduit” for the Pangang Group in the United States. [cite].

23 Substantively, the evidence proves that PAI had no corporate personality separate from the
 24 Pangang Group. In his declaration, Wang attempts to recite a number of technical formalities
 25 maintained by PAI, but those formalities are revealed to be microscopically thin when held up to
 26 the light.

- 27 • PAI has its own board of directors, but that board now has only two members, both of
 28 whom were selected by the Pangang Group, are long-time Pangang Group employees,
 29 and meet only occasionally in Chengdu at the Pangang Group’s office complex. Pattillo
 30 Decl., ¶ 8 & Ex. P.
- Wang claims PAI keeps separate books and has a domestic accountant, but those books

1 are audited by auditors from Pangang Group's finance department who go to PAI's New
 2 Jersey office for that purpose. Pattillo Decl., ¶ 12 & Ex. T.

3

- 4 • Wang may be permitted to work with suppliers other than Pangang Group, but they don't
 . . . their only supplier is the Pangang Group and their only customers are Pangang
 Group's customers. PAI is the Pangang Group's exclusive sales agent in the United
 States. Pattillo Decl., Ex. E.
- 5 • General Manager Wang claims some local management responsibilities, but his duties are
 ministerial; his discretion and authority is tightly circumscribed by policies imposed by
 the "Head Office," Pattillo Decl., Ex. D, and on financial matters he answers "to his
 superiors in China," Axelrod Decl., Ex. F.
- 6 • Wang may "determine compensation and benefits" for PAI's office administrator, but his
 and Zhang's compensation and benefits are set by Pangang Group. Pattillo Decl., Ex. H.
- 7 • Wang's assertion regarding his authority to make decisions regarding real estate is simply
 false; at the time the summonses were served, PAI was sharing an office with Angang
 America at the direction of PIETC and Angang was paying the rent. Pattillo Decl., Ex. R.

8
 9 The second prong of the alter ego test asks whether failing to pierce the corporate veil would
 10 result in an injustice. In this case, failing to permit service of the Pangang Group defendants
 11 through PAI -- whether as a general agent or an alter ego -- would indeed be an injustice. PAI
 12 was formed by Pangang Group to act as its representative in the United States and staffed by
 13 employees represented to the U.S. Government to be intra-company transfers. PAI does the work
 14 of Pangang Group in the United States, including attending to legal affairs such as the handling
 15 of defective product claims by customers and assisting Pangang Group employees who are
 16 witnesses in a federal criminal investigation.

17
 18 As alleged in the Superseding Indictment, the Pangang Group defendants intentionally sought
 19 out and obtained trade secrets developed in the United States. Their employees repeatedly
 20 traveled to the United States and they made payment for stolen technology to their co-
 21 conspirators in the United States. To allow the Pangang Group defendants to avoid answering
 22 the serious charges returned by the grand jury against them would be unjust indeed.

23
 24 The cases capably summarized by defendants in their opening brief address primarily the
 25 issue of service under Rule 4 on the domestic alter ego of a foreign organizational defendant.
 26 The cases make clear that the question must be resolved on a case-by-case basis, and because
 27 they are so factually distinct from this case, are of limited use. However, the evidence supporting
 28

1 an alter ego finding is at least as strong in this case as it was in either *Public Warehousing* or
 2 *Chitron*, where the Courts concluded that the domestic subsidiary was the alter ego of the foreign
 3 parent.⁹ *Public Warehousing* found that three factors of a twelve-factor test utilized by the
 4 Eleventh Circuit weighed in favor of the government, as well as the fact that “entities publicly
 5 presented themselves as a single company.” 2011 WL 1126333, at *6-7. In this case, at least six
 6 of the twelve factors considered in *Public Warehousing* weigh in favor of finding that PAI is the
 7 alter ego of Pangang Group,¹⁰ as does the fact that PAI holds itself out publicly to be part of
 8 the Pangang Group. *See* Pattillo Decl., Ex. E. Just as in *Public Warehousing*, the Pangang
 9 Group defendants have “not shown any reason for [PAI] to exist other than to conduct [their]
 10 business in the United States. *Id.* at *8.

11 In *Chitron*, the district court’s analysis and conclusion were even simpler. It found that the
 12 U.S. subsidiary was a “mere conduit” for the business activities of the foreign parent defendant
 13 and was, therefore, its alter ego. 644 F. Supp. 2d at 305-06. Although the particulars of the
 14 relationship between the subsidiary and the parent in that case are predictably different in that
 15 case than in this case, the conclusion that PAI is simply a conduit for Pangang Group’s business
 16 in the United States, as it was intended to be at formation, could not be clearer.

17 F. The United States’ MLAA with China is irrelevant.

18 Two cases cited by defendants suggest that the purported availability of a mutual legal
 19 assistance treaty or agreement with the home country of the corporate defendants was a reason
 20 for finding that service on a U.S. subsidiary or employee was not effective. We briefly address
 21 this in the event that defendants raise it more forcefully in their reply brief.

22
 23 ⁹ The other two cases cited by defendants, *Albert Wolff* and *Johnson Matthey* do not
 24 evaluate in any detail the business operations of the subsidiary or the parent companies under an
 alter ego test.

25 ¹⁰ “(1) the parent and the subsidiary have common stock ownership; (2) the parent and
 26 subsidiary have common directors or officers; (3) the parent and subsidiary have common
 27 business departments; . . . (5) the parent finances the subsidiary; (6) the parent caused the
 28 incorporation of the subsidiary; . . . [and] (9) the subsidiary receives no business except that
 given to it by the parent.” *Public Warehousing*, 2011 WL 1126333, at *5, *citing United
 Steelworkers of America v. Connors Steel Co.*, 855 F.2d 1499, 1505 (11th Cir. at 1988).

There is a Mutual Legal Assistance Agreement (not a treaty) between the United States and the PRC. See Judicial Assistance Agreement Between the United States of America and China, Axelrod Decl., Ex. C (MLAA). The existence of this agreement, however, is not relevant to these proceedings because, under its terms, the agreement is intended solely for the benefit of the signatory countries and does not create any rights in private parties. MLAA, Art. 1, para. 3. See *Chitron*, 668 F. Supp. 2d at 306-07 (rejecting argument that the government was required to attempt service under the MLAA with the PRC).

Moreover, the MLAA specifically exempts service of summons against those accused of crimes. Although the agreement states that while the parties shall use their best efforts to serve legal documents on behalf of the requesting country, it provides an exception, noting that “the Requested Party shall not be obligated to effect service of a document which requires a person to appear as the accused.” MLAA, Art. 8, para. 1. A summons is such a document.

V. CONCLUSION

Defendants' motion to quash should be denied.

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/s/
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